

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
STEVEN BELLO, As Administrator of the Goods, Chattels  
and Credits of CHRISTOPHER ROBERT BELLO, Deceased,

Plaintiff,

-against-

Civil No. 07 CIV. 2931  
(KMK)

CSX CORPORATION, CSX TRANSPORTATION, INC.,  
DWIGHT NEILSEN and GARY KINGMAN,

Defendants.  
-----X

**REPLY MEMORANDUM OF LAW IN**  
**SUPPORT OF PLAINTIFF'S MOTION TO REMAND**

Martin E. Fiel (MEF-0577)  
Attorney for Plaintiff  
369 South Main Street  
New City, New York 10956

(845) 634-8500  
Lawfiel@Yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	Page ii
PRELIMINARY	Page 1
STATEMENT OF FACTS	Page 1
I. DEFENDANTS' DIVERSITY/NOMINAL PARTY ARGUMENT CANNOT BE SUSTAINED	Page 2
II. PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO 28 U.S.C. § 1447(c)	Page 4
CONCLUSION	Page 5

**TABLE OF AUTHORITIES**

<b><u>FEDERAL CASES</u></b>	<b>PAGE</b>
A. Kraus & Son v. Benjamin Moore & Co., 2006 WL 1582193 (E.D.N.Y. June 7, 2006)	5
Durove v. Fabian Transport Inc., 2004 WL 2912891 (S.D.N.Y. Dec. 14, 2004)	4
Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d. Cir. 1985)	4
In Re Air Disaster at Lockerbie, Scotland On December 21, 1988, 144 F.R.D. 613 (E.D.N.Y.) 1992)	4
Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, 521 F.Supp. 1046 (S.D.N.Y. 1981)	3
Kuperstein v. Hoffman Laroche, Inc., 457 F.Supp.2d 467 (S.D.N.Y. 2006).	5
Shamoun v. Peerless Importers, 2003 WL 21781954 (E.D.N.Y. Aug. 1, 2003)	5
Zerafa v. Montefiore Hospital Housing Company, 403 F.Supp. 2d 32 (S.D.N.Y. 2005)	3
 <b><u>STATE CASES</u></b>	
Judson v. Fielding, 227 App.Div. 430, 237 N.Y.S. 348 (3d Dep't.1929)	3
Sarine v. American Lumberman's Mutual Casualty Co. of Illinois, 258 App.Div. 653, 12 N.Y.S.2d 754	3
Wilson v. City of New York, 131 N.Y.S.2d 47, (Sup. Ct. Kings County 1954)	3
 <b><u>FEDERAL RULES AND STATUTES</u></b>	
Federal Rules of Civil Procedure 11	4
28 U.S.C. § 1447(c)	1,4,5

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
STEVEN BELLO, As Administrator of the Goods, Chattels  
and Credits of CHRISTOPHER ROBERT BELLO, Deceased,

Plaintiff,

-against-

07 CIV. 2931  
(KMK)

CSX CORPORATION, CSX TRANSPORTATION, INC.,  
DWIGHT NEILSEN and GARY KINGMAN,

Defendants.

-----X

**PRELIMINARY**

Plaintiff Steven Bello ("Plaintiff") submits this Reply Memorandum of Law in support of his motion pursuant to 28 U.S.C. § 1447(c) remanding this action to the Supreme Court of the State of New York, County of Rockland, the Court in which this action was pending before it was improperly removed.

Plaintiff also seeks an award pursuant to 28 U.S.C. § 1447(c) of just costs and actual expenses, including attorneys' fees, incurred as a result of defendants' improper and improvident removal of this action.

As set forth below, defendants' removal of the instant action was improper and improvident.

**STATEMENT OF FACTS**

The underlying facts relevant to the instant motion to remand were previously set forth in Plaintiff's Memorandum of Law in Support. Defendants' Statement of Facts as contained in their Memorandum of Law in Opposition, although not pertinent to the

motion to remand, mistakenly states that “According to the police report, ... the decedent “completely ignored” the warning signals ... “. Such is clearly not the case. According to the conclusions of the Orangetown Police Department, there was a serious problem of sun glare, and coupled with the speed of the vehicle and the angle of impact, **“it does appear that the victim never saw the train approaching or the gates in a down position”** (Emphasis added)

**I      DEFENDANTS’ DIVERSITY/NOMINAL PARTY  
ARGUMENT CANNOT BE SUSTAINED**

Defendants erroneously rely upon the theory of **fraudulent joinder** and contend that Neilsen and Kingman are “nominal” parties whose citizenship should not be considered for diversity purposes and further contend were named defendants solely to defeat diversity of citizenship between the parties.

While defendants are correct that citizenship of nominal parties is disregarded for diversity purposes, the cases cited by defendant clearly provide a clear and simple definition as to what constitutes a nominal party. Defendants have disregarded their own authorities misconstrued and misapplied the cases they relied upon.

In *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell*, 521 F. Supp. 1046 (S.D.N.Y. 1981), cited and relied upon by defendants, the court described a nominal party as:

A party to an action is nominal or formal if no cause of action or claim for relief is or could be stated against him or on his behalf, as the case may be. This is determined by the substantive law of the state where the federal court sits. At 1048. (citing other cases)

*Zerafa v Montefiore Hospital Housing Company*, 403 F. Supp 2d 320 (S.D.N.Y. 2005) also relied upon by defendant, involved a housekeeper injured in a fall alleging a defective ladder and claimed against the purported owner of the real property.

The Zerafa court stated that “A party is deemed nominal if, based on the substantive law of the state where the federal court sits, no cause of could be stated against him” citing *Saxe, Bacon & Bolan, P.C. v. Martindale Hubbell*, 521 F.Supp. 1046, 1048 (S.D.N.Y. 1981). In applying New York law, the court maintained that “Under New York law, to be held liable for a dangerous property defect, the defendant must own, ... the premises on which the accident occurred”. There, plaintiff failed to prove ownership of the property by the party plaintiff alleged owned the property. Since that party could in no way be held liable, that party was considered a nominal party.

It is well-settled under New York State law, an employee and employer may be joined in a single action. New York has long held that a master and servant may be joined in a single action, as the liability is considered as that of one tort-feasor and is a consolidated and unified one. *Wilson v. City of New York*, 131 N.Y.S.2d 47, (Sup. Ct. Kings County 1954), citing, *Sarine v. American Lumberman's Mutual Casualty Co. of Illinois*, 258 App.Div. 653, 654, 12 N.Y.S.2d 754, 755.

Further, New York has long held that an employee is liable for his or her own tortuous acts even though engaged in the work of the employer. *Judson v. Fielding*, 227 A.D. 430, 237 N.Y.S. 348 (3d Dep't.1929), *aff'd*, 253 N.Y. 596 (1930). In *Judson, Id.*, the individual defendant, a bus driver, was held liable for his own acts. Contrary to defendants' contention here, the **Doctrine of Respondeat Superior** does not bar plaintiff from claiming against the individual defendant employees of the defendant corporation.

It cannot be said here, that there is no possibility that the claims against the individual defendants could be asserted in state court. This is fatal to defendants' argument. Durove v Fabian Transport Inc., 2004 WL 2912891 at \*3 (S.D.N.Y. Dec. 14, 2004).

Here, defendants have completely failed to satisfy their heavy burden to establishes the individual defendants as "nominal" parties. The cases cited by defendants in no way supportive of their ill-fated position.

**II. PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO 28 U.S.C. § 1447(c)**

In relying upon *Eastway Construction Corp. v. City of New York*, 762 F. 2d 243, 253 (2d. Cir. 1985) defendant asserts the wrong standard for the Court to award costs, including attorney's fees. In *Eastway* refers to sanctions under Fed. Rules Civ. Proc. Rule 11 which requires a greater standard for sanctions to be imposed.

Defendants further rely upon *In re Air Disaster at Lockerbie, Scotland On December 21, 1988*, 144 F.R.D. 613, 616 (E.D.N.Y. 1992) which was also based upon Fed. Rules Civ. Proc. Rule 11 and alleged false allegations made by counsel. This case is inapplicable and distinguishable since plaintiff i) has made no claim that defendants' allegations were false and ii) no sanctions under Fed. Rules Civ. Proc. Rule 11 is requested.

Here, plaintiff is requesting costs and attorney's fees, not as a sanction, but pursuant to 28 U.S.C. § 1447(c) that specifically refers to remand motions.

Plaintiff is not required to establish “bad faith” in the removal since there is no bad faith pre requisite to an award of attorneys’ fees under Section 1447. Shamoun v. Peerless Importers, 2003 WL 21781954, at \*4, (E.D.N.Y. Aug. 1, 2003).

The appropriate standard in awarding fees under 28 U.S.C. § 1447 (c) is the reasonableness of the removal. A. Kraus & Son v. Benjamin Moore & Co., 2006 WL 1582193 at \*6 (E.D.N.Y. June 7, 2006).

Here, there was no reasonable basis for defendants’ removal of this action. Defendants’ “diversity” argument, defendants offered absolutely no law in support of their position except to erroneously refer to the **Doctrine of Respondeat Superior** in support of their “nominal party” argument. Defendants made little or no attempt to meet their burden of proof to warrant removal. Under these circumstances, costs should be awarded plaintiff. Kuperstein v. Hoffman Laroche, Inc., 457 F.Supp.2d 467 (S.D.N.Y. 2006).

Where non-removability is obvious from the face of the Complaint, as it is here, coupled with the fact that defendants clearly lacked an objective reasonable or sound basis for removal, costs should be properly awarded plaintiff under 28 U.S.C. § 1447(c). See, Kuperstein v. Hoffman Laroche, Inc., 457 F.Supp.2d 467 (S.D.N.Y. 2006).

Because the removal was so clearly improper and improvident, the Court should exercise its discretion to award plaintiff costs, including attorneys fees, as part of its remand order.

### CONCLUSION

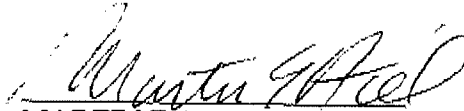
For all of the foregoing reasons, it is respectfully submitted that this Court remand this case back to the Supreme Court of the State of New York, in and for the County of



Rockland, together with an award to plaintiff of expenses and costs, including attorneys' fees, for the making of this motion and for such other relief that this court deems just and proper under the circumstances.

Dated: New City, New York  
August 17, 2007

Respectfully submitted,



MARTIN E. FIEL (MEF-0577)

Attorney for Plaintiff  
369 South Main Street  
New City, New York 10956

Tel.: (845) 634-8500  
Lawfiel@Yahoo.com

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
STEVEN BELLO, As Administrator of the Goods, Chattels  
and Credits of CHRISTOPHER ROBERT BELLO, Deceased,

Plaintiff,

-against-

CSX CORPORATION, CSX TRANSPORTATION, INC.,  
DWIGHT NEILSEN and GARY KINGMAN,

Defendants.  
-----X

AFFIRMATION OF  
SERVICE

Civil No.: 07 CIV. 2931  
(WP-4) (GAY)

MARTIN E. FIEL, an attorney duly admitted to practice law in the State of New  
York and duly admitted to the bar of this Court, affirms the following under penalty of perjury:

I am not a party to this action, I am over 18 years of age, I reside c/o 369 South Main St.,  
New City, New York 10956.

On August 17, 2007 I served a true copy of the within Reply Memorandum of Law In Support and  
Reply Affidavit of Martin E. Fiel in Support upon:

Lawrence R. Bailey, Jr., Esq.  
Hodgson Russ LLP  
Attorneys for Defendants  
60 East 42<sup>nd</sup> Street, 37<sup>th</sup> Floor  
New York, New York 10165

by depositing a true copy thereof to each named above, enclosed in a post-paid wrapper,  
in an official depository under the exclusive care and custody of the United States Postal  
Service, by First Class Mail, addressed to each of the above-described attorneys at the address  
designated by them for service.

Dated: New City, New York  
August 17, 2007



MARTIN E. FIEL (MEF 0577)